



KLAMATH-SISKIYOU WILDLANDS CENTER *ET AL.*

182 IBLA 199

Decided May 30, 2012



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

KLAMATH-SISKIYOU WILDLANDS CENTER *ET AL.*

IBLA 2012-72

Decided May 30, 2012

Appeal from a decision of the Grants Pass (Oregon) Resource Area, Medford District, Bureau of Land Management, approving the Sampson Cove Forest Management Project. OR-110-TS-10-09.

Appeal dismissed in part; decision affirmed; petition for stay denied as moot.

1. Timer Sales and Disposals: Generally

A BLM decision to proceed with a proposed timber sale, when reached after consideration of all relevant factors and supported by the record, will not be disturbed absent a showing that the decision is clearly erroneous. The decision will be deemed to be in conformance with the applicable land-use plan where it is specifically provided for in the plan, or if not specifically mentioned, is clearly consistent with the terms, conditions, and decisions of the approved plan. The burden is on the appellant to show error in the decision.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Rules of Practice: Appeals: Dismissal--Timber Sales and Disposals: Generally

A party challenging BLM's decision to approve a timber sale based on a finding of no significant impact has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Mere differences of opinion provide no basis for reversal. If the appealed

decision is the denial of a protest, the appellant must affirmatively point out error in the protest decision.

APPEARANCES: George Sexton, Ashland, Oregon, for appellants.

OPINION BY ACTING ADMINISTRATIVE JUDGE JAMES L. BYRNES

The Klamath-Siskiyou Wildlands Center (KS Wild) and others (collectively, appellants) have appealed from and petitioned for a stay of the effect of a December 7, 2011, decision of the Field Manager, Grants Pass (Oregon) Resource Area, Medford District, Bureau of Land Management (BLM), denying their protest of the August 11, 2010, Decision Record (DR) and Finding of No Significant Impact (FONSI), which approved the Althouse-Sucker Timber Sale (Timber Sale), OR-110-TS10-09.^{1, 2} The DR and FONSI were based on a February 2, 2008, Project Environmental Assessment (EA) (OR-117-07-02), which was prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006).

As a preliminary matter, only one of the appellants, KS Wild, has, through the submission of a Jan. 9, 2012, declaration by Richard K. Nawa, a KS Wild employee, along with the Notice of Appeal/Statement of Reasons/Request for Stay (NA/Request), demonstrated that it is a party to the case “adversely affected” by, and thus has standing under 43 C.F.R. § 4.410 to appeal from and seek a stay of, the December 2011 BLM decision. *See, e.g., The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA 79, 81-82, 86-87 (2005). Thus, we construe the appeal as having been brought only on behalf of KS Wild. To the extent that it was brought on behalf of Cascadia Wildlands Project and Oregon Wild, the appeal is dismissed.

¹ The appeal was brought by KS Wild, together with the Cascadia Wildlands Project and Oregon Wild.

² The Timber Sale is part of the Althouse-Sucker Landscape Management Project (Project), part of which had earlier been approved in a May 11, 2010, DR and FONSI. The Project was originally designed to generally provide for timber harvesting and other forms of vegetation management, with the objectives, *inter alia*, of thinning forest stands, enhancing wildlife habitat, restoring aquatic habitat, managing young stands, and reducing hazardous fuels. In issuing the May 2010 DR, BLM approved approximately 4,331 acres of non-commercial vegetation management in the Project area, including timber harvesting in the form of density management thinning, restoration thinning, and fuel hazard reduction. BLM’s approval did not encompass any timber sales, since it deferred any decision concerning “[t]he main commercial timber sale portion of the [P]roject and associated road construction[.]” Letter to Interested Citizen from BLM, dated May 21, 2010, at 1.

See, e.g., *Wilderness Watch*, 168 IBLA 16, 30-32 (2006); *Building & Construction Trades Council of Northern Nevada*, 139 IBLA 115, 116-18 (1997); *Resource Associates of Alaska*, 114 IBLA 216, 218-19 (1990).

For the following reasons, we affirm BLM's decision and deny the petition for stay as moot.

Background

BLM proposed to authorize, under the Timber Sale, the commercial cutting, yarding, and removal of a total of 10,093 merchantable coniferous trees, totaling 2,248 thousand board feet (MBF) of timber, from a total of 182 acres of public land, in 11 sale units, situated in secs. 9 and 35, T. 39 S., R. 7 W., and secs. 3, 4, 8, 10-12, and 18, T. 40 S., R. 7 W., Willamette Meridian, Josephine County, Oregon.^{3, 4}

³ The entire 1,074.08-acre Timber Sale Contract area encompasses the 182 acres of timber harvesting and 892.08 acres of surrounding public lands, reserved from harvesting. The Contract area is situated within the larger 30,395-acre Project area, a checkerboarded area of public and private lands, which encompasses a total of 10,483 acres of public land, including 6,983 acres of revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road Grant (O&C) land and 3,500 acres of public domain land. The Project area, which is generally located southeast of the town of Cave Junction, Oregon, is primarily within the 29,264-acre Althouse Creek Watershed and 62,544-acre Sucker Creek Watershed. Each of these 5th field watersheds flows separately into the East Fork of the Illinois River. Together, they are composed of 10,483 acres of public land administered by BLM, 57,940 acres of Federal land administered by the Forest Service, U.S. Department of Agriculture, and 23,385 acres of private, State, and county lands.

⁴ BLM proposed timber harvesting, which would mostly involve Douglas-fir, but also Ponderosa pine, Sugar pine, and Incense-cedar, by means of (1) partial cutting (including commercial thinning (CT) (with group selection) (127 acres) and density management (DM) (with or without understory thinning) (16 acres)) (143 acres in 9 units (3-1A1, 3-1A2, 8-1, 9-4A, 10-8, 12-8, 18-1, 35-13B, and 35-23)); (2) structural retention for stand regeneration (SR) (35 acres in 2 units (9-2A and 11-15)); and (3) clearcutting (4 acres in 2 rights-of-way (ROW)). SR "emphasize[d] growing a new stand of trees for future timber production," while CT and DM essentially thinned existing stands, in all cases allowing for improved health, growth, and diversity (age, size, and species) of the remaining trees. DR at 7; see *id.* at 6-7.

BLM specifically provided, in the Sale area, for the retention of all unmarked coniferous trees and all hardwood trees larger than 8 inches dbhob (diameter at breast height over bark) in the case of the 9 partial cutting units, 14 inches dbhob or

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Yarding would involve tractor and/or skyline cable yarding. Slash disposal would take place concurrent with logging, including hand piling and burning, followed by prescribed under-burning. In order to provide access to the Sale units, BLM would authorize the construction of 0.6 miles of permanent road, which would be barricaded and otherwise closed, and 0.93 miles of temporary spur roads, which would be decommissioned and obliterated, following the completion of all Project activities. In addition, a total of 14.58 miles of existing road would be renovated by blading. All of the new and renovated roads, and 18.92 miles of existing roads, would be maintained. Performance under the timber sale contract would be covered by a bond, amounting to 20 percent of the total purchase price (at least \$94,437.10).

Timber sales in the area of public lands at issue are governed by the “Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl,” generally known as the Northwest Forest Plan (NFP), which was adopted by the Secretaries of Interior and Agriculture, in an April 13, 1994, Record of Decision (ROD).⁵ The NSO (*Strix occidentalis caurina*) is a terrestrial avian species designated

⁴ (...continued)

larger in the case of Unit 9-2A, and 16 inches dbhob or larger in the case of Unit 11-15, as well as individual trees selected and marked as “Seed trees” and “Wildlife habitat trees.” See Prospectus, dated Sept. 16, 2010, at 1-2.

⁵ The NFP, which is generally set forth as Attachment A to the ROD, generally provides for the comprehensive management of timber and other natural resources on all Federal lands in California, Oregon, and Washington, within the geographic range of the Northern Spotted Owl (NSO). It amended Oregon BLM’s existing land-use plans, and was thereafter incorporated in the April 1995 Medford District Resource Management Plan (RMP), which was deemed to be applicable in the present case. See Decision at 2.

The April 1995 Medford District RMP and five other RMPs were collectively revised by the Western Oregon Plan Revisions (WOPR), adopted on Dec. 30, 2008. See generally 76 Fed. Reg. 63720, 63745 (Oct. 13, 2011). The Acting Assistant Secretary of the Interior for Lands and Minerals administratively withdrew the WOPR on July 16, 2009. However, this withdrawal was vacated on Mar. 31, 2011, by the Federal district court in *Douglas Timber Operators, Inc. v. Salazar*, 774 F. Supp. 2d 245 (D.D.C.). The effect of the court’s action was to restore the WOPR, and thus the revised RMP, by the time of BLM’s December 2011 decision. However, since the original RMP was in effect at the time of the August 2010 DR, BLM determined whether it conformed to the RMP at that time. See EA at 29 (“The Western Oregon Plan Revisions . . . are still in process [T]he purpose of th[e] current proposal is to implement the existing Medford [District] Resource Management Plan (RMP).”).

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as a threatened and endangered (T&E) species under the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1543 (2006). It is undisputed that all of the trees at issue will be felled in areas designated, pursuant to the NFP, as Matrix, where timber harvesting is generally permitted by the NFP.⁶ See NFP ROD, Attachment A, at C-39; ROD and RMP, dated Apr. 14, 1995, at 38. No timber harvesting will occur in areas designated as Late-Successional Reserve (LSR) or Riparian Reserve (RR).⁷

Using an interdisciplinary team of resource experts, BLM prepared its final EA for the Project on February 2, 2008, for the purpose of considering the potential environmental impacts of the proposed Timber Sale and other Project activities in the greater Project area.⁸ BLM considered the proposed action and two action

⁵ (...continued)

Further, we note that the WOPR is itself the subject of a pending challenge in Federal district court in *Pacific Rivers Council v. Shepard*, No. 3:11-cv-00442-HU (D. Or. Apr. 8, 2011), in which the Department has already confessed legal error, but which has yet to be finally resolved. See Memorandum Opinion, *Douglas Timber Operators, Inc. v. Salazar*, No. 09-1704 (JDB) (D.D.C. Dec. 23, 2011); Findings and Recommendations, *Pacific Rivers Council v. Shepard*, No. 3:11-cv-00442-HU (D. Or. Sept. 29, 2011), at 20 (“Having found the BLM’s adoption of the WOPR RODs without consultation as required by ESA § 7 to be arbitrary and capricious, the appropriate remedy here is to set aside the agency action, vacating the WOPR RODs, and reinstating the NFP”).

⁶ The Matrix lands in the Medford District are broken down into the Northern and Southern General Forest Management Areas (GFMAs), depending on whether the lands are situated north or south of Grants Pass, Oregon, totaling approximately 482,081 acres, and Connectivity/Diversity Blocks, totaling approximately 28,761 acres. The 182 acres of land at issue are situated in the Southern GFMA.

⁷ Within the larger Project area, most of the public lands are designated as Matrix (6,341 acres), but the remainder are designated as LSR (1,492 acres) and RR (2,651 acres), and thus subject to no or limited timber harvesting. Part of the entire area is designated as an NSO Critical Habitat Unit (CHU) (1,492 acres).

⁸ Preparation of the final EA occurred following the end of a lengthy scoping period that formally began on July 18, 2005, during which members of the public provided comments regarding the proposal to undertake the Project, and the likely issues for the environment. BLM solicited public comment regarding the final EA on Feb. 9, 2008, for a 30-day period. Comments were provided by appellants and other members of the public. BLM responded to the comments in Appendix 2 (Public Comment Summary and Response), at pages 17-23, of the DR.

The EA was tiered to the October 1994 Final Environmental Impact Statement
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alternatives (Alternatives 2-4), under which it varied the number of acres subjected, *inter alia*, to commercial thinning (with group selection) (from 0 to 518 acres), to density management (with understory thinning) (from 0 to 402 acres), to regeneration harvesting (SR) (from 150 to 600 acres), and to fuel hazard reduction (from 949 to 1,696 acres).⁹ See EA at 6 (Table 1 (Vegetation Treatments)), 11-16. Under Alternative 4, BLM proposed timber harvesting on a total of 1,515 acres of public land in the Project area, including the 182 acres now at issue, principally by means of commercial thinning (with group selection), density management (with understory thinning), and regeneration harvesting (SR), as well as 1.01 miles of new permanent road construction, 2.31 miles of new temporary road construction, 5 helicopter landings, and reopening 1.1 miles of existing temporary road spurs. See EA at 6 (Table 1), 19. BLM also considered the no action alternative (Alternative 1), under which none of the proposed timber harvesting would occur. See EA at 5-6.

BLM also prepared a Biological Assessment (BA) for the Project on March 26, 2007, pursuant to section 7(c)(1) of the ESA, 16 U.S.C. § 1536(c)(1) (2006), in order to assess the likelihood that the Project would adversely affect the Southern Oregon/Northern California Coast (SONCC) Evolutionarily Significant Unit (ESU) of the Coho salmon (*Oncorhynchus kisutch*), an anadromous fish species designated as T&E, and its designated critical habitat. See DR at 13. Based upon reviewing the BA, the National Marine Fisheries Service (NMFS), U.S. Department of Commerce, issued a May 11, 2007, Letter of Concurrence (No. 2007/01946), concurring in BLM's determination that the Project may affect, but was not likely to adversely affect, the SONCC coho salmon ESU or its designated critical habitat. See DR at 13; NMFS Letter of Concurrence, dated May 11, 2007, at 9-10, 12-14.

BLM also prepared a BA for the Project on April 1, 2010, pursuant to section 7(c)(1) of the ESA, in order to assess the likelihood that the Althouse-Sucker Timber Sale and three other timber sales would adversely affect the NSO and its designated critical habitat. See DR at 12. Based upon reviewing the BA, the Fish and Wildlife Service (FWS), U.S. Department of the Interior, issued a June 10, 2010, Biological Opinion (BiOp) (No. 13420-2010-F-0082), concluding that all of the

⁸ (...continued)

(EIS) prepared in connection with promulgation of the Medford District RMP, and, in turn, the February 1994 Final Supplemental EIS prepared in connection with the ROD for the NFP. See Decision at 2, 3-4.

⁹ Appendix B (Treatment Table) of the EA, at pages 108-157, sets out the specific treatment prescriptions for each of the myriad units in the overall Project area, including the 11 sale units now at issue. Further, each of the basic action alternatives incorporated project design features (PDF) that were set forth at pages 20-26 of the EA.

timber sales were not likely to jeopardize the continued existence of the NSO, or result in the destruction or adverse modification of its critical habitat. *See* DR at 12; BiOp at 54-55. FWS recognized that these activities would result in an “incidental take” of NSO, but that this was authorized, subject to monitoring. *See* BiOp at 55-56.

On August 11, 2010, the Field Manager issued her DR, approving the Althouse-Sucker Timber Sale, subject to implementation of numerous PDFs, designed to avoid or minimize the adverse environmental consequences of the Sale.¹⁰ She held that the Timber Sale achieves the best balance between satisfying resource use objectives and protecting resource values, by providing for the production of a sustainable supply of timber, while decreasing the risk of wildfires and promoting a healthy forest ecosystem.¹¹ *See* DR at 1, 5, 6-7, 11-12. She also held that the Sale conformed, as required by section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (2006), to the applicable land-use plan (April 1995 Medford District RMP), and thus to the NFP. *See* DR at 2, 14; EA at 2-4. She had separately concluded, in her August 11, 2010, FONSI, based on consideration of the context and intensity (or severity) factors of 40 C.F.R. § 1508.27, that the Timber Sale was not likely to result in any significant impacts to the human environment, and thus BLM was not required, by section 102(2)(C) of NEPA, to first prepare an EIS. *See* DR at 3; FONSI at 10.

BLM published a notice of the DR in a newspaper of general circulation in the area of the timber sale on August 18, 2010, thus rendering a notice of decision, which was subject to protest, pursuant to 43 C.F.R. § 5003.3(a). *See* 43 C.F.R. § 5003.2(a).

Appellants filed a protest challenging the August 2010 DR on August 31, 2010, advancing many of the same concerns now raised on appeal.¹² In her

¹⁰ The Field Manager specifically decided to approve part of Alternative 4, thus authorizing commercial timber harvesting and associated activity on 182 of the 1,515 acres of public land originally proposed for harvesting. *See* DR at 5.

¹¹ The Field Manager noted that 95 percent of the trees planned for removal were in the “smaller size classes” (24 inches dbh or smaller), and that, although large trees would be removed, that would only generally occur “when a more vigorous tree (better crown ratio, better form, free from disease and insects) of similar size can be retained,” thus causing “the remaining larger trees [to] experience less competition for nutrients, water and sunlight, thereby promoting and retaining the large tree component [of the forest.]” DR at 7.

¹² Appellants were joined in their protest by the Siskiyou Project, which has not
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December 2011 decision, the Field Manager denied the protest, and upheld the DR, finding it to be still valid, being generally consistent with the timber harvesting and other objectives of the RMP and NFP, and based on the appropriate level of NEPA analysis. *See* Decision at 22-23. After addressing all of appellants' concerns, she concluded that, as determined by BLM's resource specialists, appellants had not provided "any new or specific evidence" that the likely effects of the Timber Sale were not adequately analyzed in the EA, tiered to the RMP Final EIS and NFP Final Supplemental EIS, that the Timber Sale would cause serious harm and/or irreversible damage to any particular resource, or that would otherwise cause her to change her decision to approve the Sale. *Id.* at 23. Rather, the Field Manager stated that appellants' protest reflected their "preference for resource allocations and outcomes that are different than those previously decided upon in the N[FP] and the RMP." *Id.* at 4.

In the case of BLM's denial of a protest of a forest management decision, BLM is authorized, under 43 C.F.R. § 5003.3(f), "[u]pon denial of [the] protest . . . [to] proceed with implementation of the decision." In her protest denial decision, the Field Manager stated that BLM would, in accordance with 43 C.F.R. § 5003.3(f), proceed with implementation of the DR. *See* Decision at 23.

Appellants timely appealed the Field Manager's December 2011 decision, requesting a stay of the effect of the decision to approve timber harvesting and associated activity, including any preparation, layout, contract award, or any other site preparations by BLM, during the pendency of their appeal. They are principally concerned that the Timber Sale will result in the cutting, yarding, and removal of "mature and old growth trees" in the Sale area, noting that, "once trees are cut, those trees cannot be put back."¹³ NA/Request at 2, 15. BLM opposes any stay.

Under 43 C.F.R. § 5003.1, the filing of a notice of appeal does not automatically suspend the effect of a timber sale or other forest management decision, and thus BLM may, in accordance with 43 C.F.R. § 5003.3(f), proceed with implementation of the decision. *See In Re Eastside Salvage Timber Sale*, 128 IBLA 114,

¹² (...continued)
pursued the present appeal.

¹³ In a Jan. 18, 2012, motion to dismiss, BLM reported that, although the timber sale had occurred on Sept. 16, 2010, resulting in the Rough and Ready Timber Company (RRTC) being declared the high bidder, the 3-year timber sale contract had not been awarded, and, in any event, due to seasonal restrictions, no timber harvesting or associated activity could occur "until after May 14, 2012." Motion to Dismiss at unpaginated (unp.) 2; *see* Decision at 2. We note that a Timber Sale Prospectus (Prospectus) was prepared in connection with the September 2010 timber sale.

115 (1993). However, BLM states that it will now delay implementing its decision to approve the Timber Sale until 45 days following the end of the 30-day appeal period. See Response to Petition for Stay (Response) at 11; Response to Statement of Reasons (Answer) at 8.

Discussion

Appellants principally contend that BLM's decision to approve timber harvesting and associated activity primarily violates the land-use plan conformance requirement of section 302(a) of FLPMA, and the environmental review requirements of section 102(2)(C) of NEPA.

The Project Complies with FLPMA

Appellants argue that BLM's decision to approve the Timber Sale violated section 302(a) of FLPMA by failing to abide by the green tree retention standards and guidelines of the NFP, incorporated in the Medford District RMP.

[1] BLM is required, as a matter of law, by section 302(a) of FLPMA, 43 U.S.C. § 1732(a) (2006), to “manage the public lands . . . in accordance with the [applicable] land use plan[,]” and thus to ensure that the exercise of its discretionary authority to approve actions conforms to the existing land-use plan. See 43 C.F.R. §§ 1610.5-3(a) (“All future resource management authorizations and actions . . . shall conform to the approved plan”); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004) (“[These statutory and regulatory provisions] prevent BLM from taking actions inconsistent with the provisions of a land use plan”); *Tom Van Sant*, 174 IBLA 78, 91-92 (2008); *Dona Jeanette Ong*, 165 IBLA 274, 278 (2005); *Jenott Mining Corp.*, 134 IBLA 191, 193-94 (1995). A proposed management action will be deemed to be in conformance with a land-use plan where it is “specifically provided for in the plan, or if not specifically mentioned, [is] . . . clearly consistent with the terms, conditions, and decisions of the approved plan[.]” 43 C.F.R. § 1601.0-5(b) (“*Conformity or conformance*”).

Appellants argue that BLM failed to abide by the NFP standards and guidelines by not providing for the retention of 16 to 25 large green trees per acre in the case of the regeneration harvest (SR) units “and perhaps others.” NA/Request at 7; see *id.* at 6-7.

The NFP provides, with respect to the GFMA, that, “[f]or lands administered by the BLM in Oregon south of Grants Pass, retain 16 to 25 large green trees per acre in harvest units,” and for lands north of Grants Pass, “retain 6 to 8 [large] green trees

per acre in harvest units.”¹⁴ NFP ROD, Attachment A, at C-42. Such prescriptions are to be applied “throughout the matrix forests.” *Id.* at C-41. BLM refined this prescription in the Medford District RMP, providing for the retention of at least 16 to 25 and 6 to 8 large green conifer trees per acre, respectively, in the Southern and Northern GFMA, in the case of “regeneration harvest units.” ROD and RMP at 73. In the case of the two regeneration harvest (SR) units at issue (9-2A and 11-15), BLM specifically provided for compliance with the prescription, in the NFP and RMP, for retaining 16 to 25 large green conifer trees per acre. *See* DR at 5 (“SR retains 16-25 large green conifers (>20"DBH) per acre across the natural range of diameters present in the stand”); Answer at 4.

However, in the course of its decisionmaking, BLM noted that it retained the authority to deviate from the green tree retention prescriptions in the NFP and RMP “based on site-specific conditions[.]” Decision at 11. It thus stated that it could decide to adopt a 9 to 16 large green tree per acre retention prescription where competition from excessive levels of tanoak was preventing conifer growth and development. *See* Decision at 11; DR at 18-19; EA at 12, 49. Indeed, BLM proposed as part of the overall Project, under Alternative 4, a total of 306 acres of regeneration harvesting (SR) using the 9-16 large green tree per acre retention prescription, and 294 acres of regeneration harvesting (SR) using the 16-25 large green tree per acre retention prescription. *See* EA at 12, 49. It noted the former “stands are currently composed of a very dense understory of tanoak,” which, following timber harvesting to the 9-16 large green tree retention level, would be treated by prescribed slashing, handpiling/burning, and under-burning to reduce the tanoak. Decision at 11; *see* DR at 18-19; EA at 12, 49. BLM noted that this approach was consistent with the general direction in the RMP, which provided for adopting the Northern GFMA prescription in the case of the Southern GFMA: “[T]here will be local situations in the northern GFMA that should be managed along southern GFMA prescription guidelines and vi[ce] versa.” ROD and RMP at 72.

Appellants argue that BLM thereby violated the NFP: “When standards from BLM [RMPs] are different than the NFP, the more restrictive standard is applied. Thus, the 16-25 tree retention standard must be applied in the SGFMA *with no exceptions.*” NA/Request at 7, emphasis added. They note that the NFP specifically provided that the standards of RMPs may be applied when they are more restrictive than the NFP standards, thus requiring that the NFP standards be applied when the RMP standards are less restrictive. NA/Request at 7 (citing NFP ROD, Attachment A, at A-2). Appellants assert that, since BLM provides for cutting a total of 1,183 large trees from the entire 182-acre Timber Sale area, this translates to 6.5 large trees per

¹⁴ Large green trees are trees having a dbhob greater than 20 inches. *See* ROD and RMP at 193; DR at 5; EA at 12.

acre, and conclude that “[t]his intensity of large tree cutting would likely put many acres below the minimum retention standard of 16-25 large trees per acre.” NA/Request at 7 (citing DR at 8 (Table DR-2 (Number of Trees, Volumes and Percentages by Diameter Size Class))).

However, in the case of the Timber Sale, BLM ultimately decided, with respect to the regeneration harvest (SR) units (9-2A and 11-15), to abide by the 16-25 large green tree per acre retention prescription, and thus did not deviate from the NFP and RMP. Indeed, we find no evidence that any of the 35 acres of regeneration harvest (SR), or elsewhere in the Sale area, is so dominated by tanoak that BLM might have decided to deviate from that prescription. See EA at 44-45, 49. Nor have appellants identified any acreage in these units or elsewhere in the Sale area where BLM has deviated from that prescription.

Appellants fail to establish that, in the case of 182 acres of timber harvesting currently at issue, BLM actually approved any harvesting that would exceed the 16-25 large green trees per acre standard, taken from the NFP and RMP, for the Southern GFMA. Rather, they only assert that this is “likely[.]” NA/Request at 7.

We conclude that KS Wild has not demonstrated that BLM’s decision to approve the Timber Sale failed to conform to the NFP and RMP, and thus violated the land-use plan conformance requirement of section 302(a) of FLPMA.

BLM Complied with the Environmental Review Requirements of NEPA

[2] Appellants argue that BLM violated section 102(2)(C) of NEPA by (1) failing to adequately consider in the EA the risks of introducing and spreading Port Orford Cedar (POC) root disease (*Phytophthora lateralis*) in POC stands in the Sale area;¹⁵ (2) failing to disclose in the EA the increased fire hazard and

¹⁵ Appellants also argue that BLM failed to comply with the May 10, 2004, ROD and RMP Amendment for Management of Port-Orford-Cedar in Southwest Oregon, Coos Bay, Medford, and Roseburg Districts (BLM/OR/WA/PL-04/024+1792), issued by the State Director, Oregon/Washington, BLM, concerning the adoption of appropriate measures for reducing the introduction and/or spread of POC root disease in POC stands. See NA/Request at 5. BLM is required to abide by the ROD, which amended the 1995 RMP. See Decision at 19; DR at 2. The Field Manager concluded, in her DR and FONSI, that the Timber Sale was generally consistent with the ROD. See DR at 14; FONSI at 4. Nowhere do appellants identify any particular requirement, directive, or prescription adopted in the ROD that BLM failed to follow in deciding to approve the Timber Sale. While they repeatedly assert that the prospective measures
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degradation of wildlife habitat attributable to the removal of most mature hardwood trees in the two regeneration harvest (SR) units (9-2A and 11-15); (3) failing to disclose in the EA the fact that road construction in the Althouse Creek Watershed will increase road density in an area that already has a high road density; and (4) failing to prepare a single EIS in order to address the potential cumulative significant impacts on terrestrial and aquatic resource values of engaging in logging and road construction in the case of the Althouse-Sucker Timber Sale and 5 other timber sales (Anderson West Addendum, South Deer, West Fork Illinois River, East Fork Illinois River, and Tennessee Lime) in the Illinois River Valley area of southwestern Oregon.

Section 102(2)(C) of NEPA requires consideration of the potential environmental impacts of a proposed action in an EIS if that action is a “major Federal action[] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2006). A BLM decision to proceed with a proposed action, based on an EA tiered to a programmatic EIS, will be upheld, as being in accord with section 102(2)(C) of NEPA, where the record demonstrates that BLM has, considering all relevant matters of environmental concern, taken a “hard look” at potential environmental impacts, and made a convincing case that no significant impact will result that was not already addressed in the EIS or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. *Wyoming Outdoor Council*, 173 IBLA 226, 235 (2007).

Importantly, in assessing the adequacy of an EA, we will generally be guided by the “rule of reason,” such that the EA need only briefly discuss the likely impacts of a proposed action: “By nature, it is intended to be an overview of environmental concerns, *not* an exhaustive study of all environmental issues which the project raises.” *Bales Ranch, Inc.*, 151 IBLA 353, 358 (2000) (*quoting Don’t Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1247 (M.D. Pa. 1992)).

An appellant seeking to overcome such a decision carries the ultimate burden to demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *Bales Ranch, Inc.*, 151 IBLA at 357.

BLM’s decision, after environmental review, to issue a FONSI, and not prepare an EIS, “implicates agency expertise.” *Greater Yellowstone Coalition v. Flowers*,

¹⁵ (...continued)

set forth in the Prospectus do not fully comport with the measures set forth in the EA, they make no effort to show how any such deficiency, even assuming it exists, failed to comply with the ROD.

359 F.3d 1257, 1274 (10th Cir. 2004). Thus, where, in assessing environmental impacts, BLM properly relies on the professional opinion of its technical experts, concerning matters within the realm of their expertise and which is reasonable and supported by record evidence, an appellant challenging such reliance must demonstrate, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the expert. *Wyoming Outdoor Council*, 173 IBLA at 235 (citing *Fred E. Payne*, 159 IBLA 69, 77-78 (2003)). A mere difference of opinion, even of expert opinion, will not suffice to show that BLM failed to fully comprehend the true nature, magnitude, or scope of the likely impacts. *Id.*

First, appellants argue that BLM failed to adequately consider in the EA the risks of introducing and spreading the POC root disease in POC stands in the Sale area. *See* NA/Request at 5-6. They specifically note that, in adopting mitigation measures for reducing the introduction and spread of the root disease, as set forth in the Prospectus, BLM either failed to adopt or adopted measures less restrictive than the measures set forth at page 52 of the EA, and thus increased the risk of introducing and spreading the disease. They refer to BLM's failure (1) to require the washing of vehicles when leaving any POC root disease area or entering any POC area, rather than generally before entering public lands; (2) to preclude log hauling generally during the wet season/wet conditions, rather than from October 15 to May 15;¹⁶ (3) to require any work to be done in uninfected POC stands before undertaking any work in infected POC stands; and (4) to require water used in road treatments and prescribed fire operations to be either from uninfected water sources or pre-treated with bleach.

BLM considered the likelihood that the Timber Sale would promote the introduction and spread of the POC root disease, concluding that, given adoption of PDFs, which were the mitigation measures designed in accordance with the May 2004 POC ROD, the risk of introducing or spreading the disease in POC stands in the Sale area, as a result of timber harvesting, hauling, and other Project activities, was "negligible."¹⁷ EA at 52; FONSI at 6; DR at 21; *see* EA at 45, 52. Appellants

¹⁶ We note that BLM does not, under its PDFs, simply restrict logging and hauling to the period from October 15 to May 15, but specifically states that the "[d]ates may vary *depending on weather, road surface, and soil moisture.*" EA at 21, emphasis added; *see id.* at 95 ("Hauling could continue as long as the running surface remained dry. Hauling would be suspended during wet conditions.").

¹⁷ BLM was aware that the POC root disease was present in only one portion of the Contract area where timber harvesting was originally proposed, in connection with the overall Project, *i.e.*, the riparian areas in sec. 9, T. 40 S., R. 7 W., Willamette Meridian, Oregon. *See* EA at 52; DR at 21. No Sale unit is found in that section. It

(continued...)

argue, however, that since BLM's conclusion that the risk is negligible hinges on adoption of all of the PDFs envisioned in the EA, BLM is not justified in drawing that conclusion where it clearly does not intend, as set forth in the Prospectus, to adopt all of the PDFs, either at all or as set forth in the EA. *See* NA/Request at 6. Indeed, they assert that the risk is likely to be "higher[.]" *Id.* While not clearly spelled out in the Prospectus, all of the PDFs were incorporated into Alternative 4, which encompasses the Timber Sale now at issue, and, thus, when BLM approved the Sale in the DR, it approved the adoption of all of the PDFs.¹⁸ *See* DR at 2 ("All project design features . . . are integral to the selected alternative and will be implemented"); Prospectus, Exhibit C-11 at "Page 1 of 25." In the end, appellants offer no convincing argument or any supporting evidence that logging, hauling, and other activities under the Timber Sale are likely to result in the appreciable introduction and/or spread of the POC root disease.

Second, appellants argue that BLM failed to disclose in the EA the increased fire hazard and degradation of wildlife habitat attributable to the removal of most mature hardwood trees in the two regeneration harvest (SR) units (9-2A and 11-15).¹⁹ *See* NA/Request at 6. They assert that several studies in the scientific literature, which are generally cited (by author and year of publication), demonstrate that the prescription for the removal of all unmarked hardwood trees between 8 and 16 inches dbhob, along with the marked coniferous trees, "degrades habitat for a myriad of wildlife species" and "increases fire hazard," by promoting the accelerated growth of underlying shrubs and other means. *Id.*

BLM thoroughly considered the likely effects of timber harvesting in the Sale area, including the two regeneration harvest (SR) units (9-2A and 11-15), in terms of the risk of promoting the initiation and spread of wildfires and the degradation of wildlife habitat. *See* EA at 52-58, 60-66, 68-80; FONSI at 6-7; DR at 22; Decision at

¹⁷ (...continued)

is, however, crossed by an access road used in connection with the Sale.

¹⁸ BLM properly notes that the PDFs actually provided that operations would be limited to the dry season/dry conditions in infected and uninfected areas and proceed from uninfected to infected areas, "[w]hen feasible[.]" EA at 20, 52; *see* Response at 8; Answer at 2-3.

¹⁹ Appellants generally assert that BLM failed to disclose the increased fire hazard and degradation of wildlife habitat stemming from the removal of most mature hardwood trees "particularly in Structural Retention units 11-15 and 9-2A," thus suggesting that the argument applies broadly to all units in the Sale area. NA/Request at 6 (emphasis omitted). However, it is clear that they focus exclusively on the two structural retention units.

10 (“[U]nder Alternative 4, up to 379 acres of suitable habitat [for the NSO] would be removed by SR harvest . . . , while the DR authorized only 35 acres of SR . . . ; therefore, effects would be expected to be less than disclosed in the EA”). It provides that, in all cases, in order to promote wildlife habitat and stand diversity, at a minimum, from two to four large hardwood trees (greater than 12 inches dbhob) would be retained for each acre of the Sale area, which was consistent with the prescriptions in the RMP, for both the northern and southern portions of the GFMA. See EA at 12, 50; DR at 6; ROD and RMP at 73, 191, 193. It also provided, following timber harvesting, for handpiling/burning, followed by prescribed under-burning, in the case of all units, in order to reduce hazardous fuels, and the risk of wildfire. See EA at 7; DR at 2, 9-10.

Appellants offer no convincing argument or any supporting evidence that BLM failed to adequately assess the likelihood that the prescription for the removal of hardwood trees in the Sale area, including the two regeneration harvest (SR) units (9-2A and 11-15), will appreciably increase the fire hazard or degrade wildlife habitat in that area. It is not enough to cite to general scientific literature without making any effort to translate such scientific information to the particular proposed action and the circumstances under which it will occur, or otherwise demonstrate its relevance to the environmental consequences of that action. Such citation does not demonstrate that BLM failed to properly comprehend the expected consequences of the Sale, or to fully appreciate their significance, and thus does not establish a violation of NEPA. *Biodiversity Conservation Alliance*, 171 IBLA 218, 228-29 (2007); *Biodiversity Conservation Alliance*, 169 IBLA 321, 343 (2006).

Third, appellants argue that BLM failed to disclose in the EA the fact that road construction in the Althouse Creek Watershed will increase road density in an area that already has a high road density (4.9 miles and 4.5 miles per square mile, respectively, on public and private lands), thus exacerbating the erosion and sedimentation impacts to soils and aquatic resources of increasing and concentrating surface and groundwater run-off.²⁰ See NA/Request at 7-8.

²⁰ Appellants also argue that, although it noted at page 166 of the EA that it needed to obtain an ROW across private land in order to fully secure access to the Sale area, BLM failed to obtain an ROW before conducting the Timber Sale. See NA/Request at 8-9. The road across private land, which is composed of two segments (40-7-5A and 40-7-8A, situated, respectively, in secs. 5 and 8, T. 40 S., R. 7 W., Willamette Meridian, Oregon) would be used to access the 48 acres of timber harvesting on public lands in Unit 8-1. See EA at 20. BLM notes, on appeal, that it already had legal access, and thus the right to build the new 0.14-mile long (40-7-5A) and 0.46-mile long (40-7-8A) roads, across the private land, to Unit 8-1, by virtue of a
(continued...)

BLM considered the fact that road construction, approved in connection with the Timber Sale, will slightly increase the road density in the Sale area, concluding that this was likely to have little to no adverse impacts to soils and aquatic resources from erosion and sedimentation. *See* EA 19, 25, 29-40, 42-43 (Table 9 (Cumulative Effects After Proposed Management Actions)), 89-95, 98-100. It concluded that, in general, it expected no increase in sediment entering local streams “above back ground levels,” given the “minimal to no increases” to peak flow and soil erosion and the absence of any mechanism for routing sediment to streams, and thus “no anticipated effects to fish or fish habitat[.]” DR at 19; *see* FONSI at 5-6. Appellants fail to demonstrate that the construction of 0.6 miles of permanent roads and 0.93 miles of temporary roads in a 182-acre Sale area, within a 1,074.08-acre Contract area, is likely to have any environmental ramifications worthy of further analysis in the EA.

Fourth, appellants argue that BLM failed to prepare a single EIS in order to address the potential cumulative significant impacts of “6 *contiguous commercial logging projects* in the Illinois [River] Valley affecting 3 rivers (West Fork Illinois River, East Fork Illinois River, mainstem Illinois River) and 4 communities (Kerby,

²⁰ (...continued)

reciprocal ROW and Road Use Agreement with Indian Hill L.L.C. *See* Response at 9; Answer at 4; Amendment No. 12 to ROW and Road Use Agreement M-1166 (OR 056811 PT) and to O&C Logging Road ROW and Permit M-1166 (OR 056811 FD), dated Apr. 5, 2010. We are not persuaded that BLM failed to secure access across the private land before conducting the Timber Sale. Nor are we convinced that BLM failed to adequately consider the likely effects of constructing the road on private land, as part of the proposed Sale, in the EA. *See* EA at 18-20; DR at 10-11.

Appellants also assert that, since RRTC is an “affiliate” of Indian Hill, it had an “unfair advantage” in bidding on the Timber Sale, because it was assured of obtaining the ROW. NA/Request at 8. We do not find any evidence that BLM failed to obtain fair market value at the Sale.

Appellants also state that BLM misled the public, in the EA, when it noted that Alternative 4, which included the Timber Sale now at issue, would, in general, result in a decrease in road density. *See* NA/Request at 8 (citing EA at 20). We find nothing misleading about the EA, since it incorporated not only new road construction, but also a substantial decommissioning of existing roads, resulting in a net decrease in road density in the Project area. The fact that BLM did not, in its August 2010 DR, approve that decommissioning in conjunction with the Timber Sale does not render the earlier Project EA misleading. *See* Response at 9 (“[T]he decision to decommission 5 miles of road was authorized under the first decision for th[e] [P]roject”).

Selma, Cave Junction, Takilma).” NA/Request at 11, emphasis added; *see id.* at 9-14. They specifically identify potential cumulative significant impacts to the domestic drinking water supply for Cave Junction in the East Fork of the Illinois River watershed, fish and other aquatic resources in the Illinois River system, migration corridors and other aspects of wildlife habitat throughout the Illinois River Valley, POC throughout the Illinois River Valley, late-successional and old-growth forest throughout the Illinois River Valley, roadless character of the Illinois River Valley, and migratory birds in the Illinois River Valley.²¹ Finally, appellants assert that the October 1994 Final EIS, prepared in connection with promulgation of the April 1995 Medford District RMP, cannot serve to remedy BLM’s failure to prepare an EIS specifically addressing the likely cumulative significant environmental impacts of the Timber Sale.

BLM is plainly required by section 102(2)(C) of NEPA and its implementing regulations to consider the potential cumulative impacts of a proposed action. 40 C.F.R. § 1508.25; *see, e.g., Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 809-10 (9th Cir. 1999); *Howard B. Keck, Jr.*, 124 IBLA 44, 53 (1992), *aff’d*, *Keck v. Hastey*, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993). Such impacts are those which result from the incremental impact of the proposed action “when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7.

We note that all 5 timber sales appear to predate the Timber Sale currently at issue, by from 6 to 7 years, with two that occurred in or about 2005 (South Deer and West Fork Illinois River) and three that occurred in or about 2006 (Anderson West Addendum, East Fork Illinois River, and Tennessee Lime). *See* NA/Request at 9. In any event, the 6 timber sales are not contiguous, but rather consist of a total of 983 acres of commercial timber harvesting, as well as associated road

²¹ Appellants also assert that there are likely to be cumulative significant impacts because of the repeated “[p]ublic opposition” to the 6 timber sales. NA/Request at 11. Whether a proposed action is likely to have a significant impact is determined, in relevant part, by considering “[t]he degree to which *the effects* on the quality of the human environment are likely to be highly controversial.” 40 C.F.R. § 1508.27(b)(4), emphasis added. It is well settled that a proposed action can be considered “highly controversial” when “a substantial dispute exists as to the size, nature or effect of the . . . [F]ederal action.” *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973). It has nothing to do with the extent of public opposition to the project itself. *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001), *cert. denied*, 534 U.S. 1104 (2002); *Mary Lee Dereske*, 162 IBLA 303, 322 (2004); FONSI at 8; Decision at 18, 19; Answer at 6.

construction/reconstruction, scattered across the 633,517-acre Illinois River Valley.²² See Decision at 20; DR at 22.

In addition, BLM fully considered the potential cumulative impacts of the Timber Sale, concluding that they were unlikely to be significant, especially where the timber harvesting would decrease the late-successional wildlife habitat in the Illinois River Valley, either alone or together with the five other timber sales, by less than one percent, and little to no timber harvesting would occur in the case of riparian reserves, LSRs, and other designated areas in the Illinois River Valley. See EA at 27 (“[A] description of the current state of the environment inherently includes the effects of past actions”), 29, 42-43 (Table 9 (Cumulative Effects After Proposed Management Actions)), 44 (“Since post project cumulative effects remain at pre-project ranges at the 7th field [subwatershed] scale, the project would not generate cumulative effects to the 6th field subwatershed and 5th field watersheds or for the East Fork of [the] Illinois River”), 51, 58, 78-80, 98, 99, 100, 187-88; FONSI at 9; DR at 21 (“There are no unroaded sections in the [P]roject area”); Decision at 9-10, 11-12, 18, 19-21, 22; Answer at 6-7. Above all, it concluded, referring to the five other timber sales, “*none of the effects of these projects [is] additive or synergistic with the effects of the Althouse Sucker project,*” and thus “there are no anticipated cumulative effects from project activities that were not addressed in the EA.” Decision at 20, emphasis added.

Appellants have not identified any likely cumulative impact that was overlooked by BLM, or the nature and significance of which was not adequately addressed by BLM, in the EA and the RMP Final EIS, which together afforded the appropriate site-specific level of analysis. They offer no evidence that the proposed construction of 1.53 miles of temporary/permanent road, harvesting of 10,093 trees from 182 acres, and related activity, in conjunction with the Timber Sale, is likely, together with past, present, and reasonably foreseeable future logging and associated road construction, to have any cumulative or synergistic effect on the environment that BLM was required to consider. See, e.g., *Umpqua Watersheds, Inc.*, 158 IBLA 62, 73 (2000); *Klamath Siskiyou Wildlands Center*, 157 IBLA 332, 339-41 (2002); compare with *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 996 (9th Cir. 2004) (“[T]he potential for . . . serious cumulative impacts is apparent here, such that the subject requires more discussion than these EAs provide”), 997. Nor have they offered any evidence that any cumulative impact is likely to be significant.

²² BLM notes that, in addition the current and past timber sales, it has proposed a timber sale (Deer North) on 799 acres of public land in the Illinois River Valley, which has resulted in the approval of 107 acres, bringing the total of past, present, and reasonably foreseeable future timber harvesting up to 1,090 acres, or “less than 0.2% of the [River Valley] basin.” Decision at 20.

Appellants completely fail to offer any argument or supporting evidence demonstrating that, owing to geographic proximity or any other factor, there is likely to be ***an interaction*** between the Timber Sale and any of the past, present, and/or reasonably foreseeable future projects or activities that might result in a specific cumulative impact, which BLM failed to address. *Wyoming Outdoor Council*, 147 IBLA 105, 109 (1998). We have long held that, in order to demonstrate a deficiency in BLM's cumulative impacts analysis, "it is not sufficient merely to note the existence of other . . . projects . . . without concretely identifying the adverse impacts caused by such other . . . projects to which the action being scrutinized will add." *National Wildlife Federation*, 150 IBLA 385, 399 (1999). Nor is it enough to simply assert, without any supporting evidence, that the logging of mature and old-growth trees "over many thousands of acres" and compacting soils "with many miles of new roads," in the case of 6 timber sales, in a "single geographic/watershed area (Illinois [River] Valley)" will have a cumulative significant impact. NA/Request at 9. Nor is it enough to suppose that BLM is likely to have uncovered a cumulative significant impact if it had only prepared a "single EIS" addressing all of the 6 timber sales, rather than "piecemeal[ing]" the environmental analysis into 6 separate EAs. *Id.*

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the appeal is dismissed to the extent it was brought on behalf of Cascadia Wildlands Project and Oregon Wild; the decision appealed from is affirmed; and the petition for a stay is denied as moot.

_____/s/
James L. Byrnes
Acting Administrative Judge

I concur:

_____/s/
James F. Roberts
Administrative Judge